

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

LIONEL McCLELLAND	§	PLAINTIFF
	§	
v.	§	Civil Action No. 1:10CV304-LG-RHW
	§	
SOUTHERN FINANCIAL SYSTEMS, INC., AND DOES 1-10	§	DEFENDANTS

**ORDER DENYING SOUTHERN FINANCIAL
SYSTEMS' MOTION TO DISMISS**

BEFORE THE COURT is the Motion to Dismiss Complaint [4] pursuant to Rule 12(B)(5) that was filed by Southern Financial Systems, Inc., on August 16, 2010. Lionel McClelland filed an untimely response to the Motion on September 7, 2010. Thirteen days have passed since the untimely response was filed, and Southern Financial has not filed a reply to the response or a Motion to Strike the Response. As a result, the Court has considered the response. Upon reviewing the submissions of the parties and the applicable law, the Court finds that the Motion to Dismiss should be denied as premature.

DISCUSSION

Lionel McClelland filed a Complaint against Southern Financial on July 6, 2010. On July 19, 2010, summons issued, and on July 29, 2010, counsel for Southern Financial filed a Motion for Extension of Time to File an Answer, which was granted. The text only order granting the Motion provided that the answer was due on August 19, 2010. On August 16, 2010, counsel for Southern Financial filed the present Motion to Dismiss [41], asserting that the Motion for Extension of Time to File an Answer was filed in error based on the belief that his client had been served with process. He

requested dismissal of the Complaint pursuant to Rule 12(B)(5) for insufficient service of process. McClelland has filed a Response to the Motion, arguing that the Motion for Extension of Time to Answer was filed before McClelland had the opportunity to serve Southern Financial. He also notes that the deadline for serving Southern Financial had not expired when the Motion to Dismiss, and he demands that Southern Financial be required to answer the complaint, since he claims that he has now served Southern Financial with process.

The Court finds that the Motion to Dismiss should be denied. Only forty-one days had passed between the filing of the Complaint and the filing of the Motion to Dismiss for insufficient service of process. Rule 4(m) of the Federal Rules of Civil Procedure allows a plaintiff 120 days to serve a defendant with process. As a result, the Motion to Dismiss was premature.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion to Dismiss Complaint [4] pursuant to Rule 12(B)(5) that was filed by Southern Financial Systems, Inc., is **DENIED**.

SO ORDERED AND ADJUDGED this the 21st day of September, 2010.

s/ *Louis Guirola, Jr.*
Louis Guirola, Jr.
United States District Judge